IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SANDRA JONES,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	**CASE NO. 5:16-cv-00154-OLG**
	§	
R.G. BARRY CORPORATION,	§	
	§	
Defendant.	§	

R.G. BARRY CORPORATION'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

Pursuant to Federal Rule of Civil Procedure 56, Defendant R.G. Barry Corporation ("RG Barry") respectfully moves for summary judgment in its favor and against Plaintiff Sandra Jones on all of her claims and shows as follows:

I. SUMMARY

Though Plaintiff, Sandra Jones, claims she was terminated because of her age and sex, there is no evidence to support such claims. Rather, the evidence demonstrates that RG Barry made many favorable decisions for the benefit of Plaintiff during her employment. The most telling evidence is that the person who made the decision to terminate her, Glenn Evans, also made the decision to promote Plaintiff when she was 50 years old to manage the entire distribution center in San Angelo, Texas. Then, when the distribution center was closed in 2012, Mr. Evans terminated all its employees, except for Plaintiff, who he retained on a temporary basis to assist with the transition of the distribution center's function to a third party logistics provider. Plaintiff was 55 years old at the time Mr. Evans made the decision to retain her employment in Texas. Nearly three years later, because RG Barry failed to meet its sales plan, it was required to cut expenses. Consequently, Mr. Evans eliminated Plaintiff's position—the only remaining position in Texas of an Ohio-based company—since her job responsibilities could be eliminated entirely or absorbed by others in the Ohio office. Of the employees retained, 60% were female and 61% were over the age of 40 (6% of whom were older than Plaintiff).

Plaintiff's claims are based solely on the fact that one of the employees who absorbed some of her responsibilities was a younger male, Seth DeVlugt. Plaintiff believes that she was terminated so that Mr. DeVlugt (who held an entirely different position) could be retained. However, Plaintiff's own testimony belies her claim that Mr. DeVlugt was retained for reasons related to age or sex, since she testified that he was retained because he was "very educated," "handsome," was experienced in RG Barry's new operating system, came across to others as knowledgeable, and RG Barry could pay him less. Plaintiff, therefore, has no evidence that her termination was for any purpose other than to reduce costs.

For the foregoing reasons and those set forth more fully below, Plaintiff's claims should be dismissed.

II. SUMMARY JUDGMENT EVIDENCE

In support of its Motion for Summary Judgment, Defendant incorporates by reference the following proof:

EXHIBIT A	Affidavit of Angela Gibson;
EXHIBIT A-1	Excerpts from the September 8, 2016 Deposition of Sandra Jones;
EXHIBIT A-2	Excerpts from the September 13, 2016 Deposition of Chris Dickson;
EXHIBIT A-3	Excerpts from the September 13, 2016 Deposition of Greg Tunney;
EXHIBIT A-4	Excerpts from the September 13, 2016 Deposition Kathleen Woods;
EXHIBIT A-5	Exhibit from September 8, 2016 Deposition of Sandra Jones, Equal Employment Opportunity Commission Intake Questionnaire;

EXHIBIT A-6	Exhibit from September 13, 2016 Deposition of Chris Dickson, December 2014 Statement of Responsibility, Operations Manager;
EXHIBIT A-7	Exhibit from September 8, 2016 Deposition of Sandra Jones, Distribution Center Manager Job Description;
EXHIBIT A-8	Excerpts from the November 1, 2016 Deposition of Glenn Evans;
EXHIBIT B	Affidavit of Glenn Evans;
EXHIBIT C	Affidavit of Dru Williams;
EXHIBIT C-1	Excerpts of January 5, 2015 Reduction in Force list;
EXHIBIT C-2	January 5, 2015 Letter from RG Barry to Seth DeVlugt;
EXHIBIT C-3	Excerpts of RG Barry Employment Application of Seth DeVlugt;
EXHIBIT C-4	Excerpts of Resume of Seth DeVlugt;
EXHIBIT C-5	Performance Review Form, Sandra Jones, from 7/1/2013 to 6/30/2014;
EXHIBIT C-6	Performance Review Form, Seth DeVlugt, from 7/1/2013 to 6/30/2014.

III. UNDISPUTED MATERIAL FACTS

A. Plaintiff's Supervisor, Glenn Evans, Promoted Plaintiff and Gave Her Raises Throughout Her Employment

Plaintiff began working for RG Barry, a developer and marketer of accessories footwear, on September 7, 1982.[1] Plaintiff worked at RG Barry's San Angelo, Texas sewing factory and then its distribution center ("DC") until it closed in 2012, at which time Plaintiff began working remotely from her home until her termination in 2015.[2] Throughout her employment, Plaintiff received multiple promotions and raises.[3] In 2007, Glenn Evans, Senior Vice President of

[1] Exh. "A-1," at 10:6-10.
[2] Exh. "A-1," at 10:11-18, 11:6-16, 16:18-19, 21:13-15.
[3] Exh. "A-1," at 126:16-18.

Global Operations and Plaintiff's direct supervisor, promoted Plaintiff to Distribution Manager of the San Angelo, Texas DC.[4] Plaintiff was 50 years old at the time.[5]

As the DC Manager, Plaintiff was responsible for, among other things, management of the warehouse and production efforts to ensure that customer needs were met; development of packaging needs and handling of building maintenance; development of plans to accurately maintain appropriate inventory levels; and performance of tasks as necessary to ensure accurate and timely information flowed between management and staff.[6]

B. RG Barry Closed the San Angelo DC and Terminated Everyone, Except Plaintiff

In order to reduce costs and increase service, RG Barry closed its San Angelo DC in April 2012 and outsourced its function to a third-party logistics provider ("3PL"), UTi Transport Solutions ("UTi"), which was located in California.[7] RG Barry believed that using a 3PL that specialized in logistics would reduce the cost to RG Barry of operating its own distribution center and reduce lead time on getting its products shipped.[8] At the time, Mr. Evans oversaw the San Angelo DC and had input into the decision to close it down.[9]

As a result of the closure, Mr. Evans terminated every employee in San Angelo, except for Plaintiff, who was 55 years old at the time.[10] Mr. Evans retained Plaintiff on a temporary basis, which he expected to last no more than 18 months, to assist with the transition of operations from San Angelo to UTi.[11] Specifically, Plaintiff was initially expected to function as a transition liaison by helping UTi understand the particular shipping requirements of RG

[4] Exh. "A-1," at 13:24-25, 14:1-25; Exh. "B," at ¶ 2.
[5] Exh. "A-1," at 140:8-9.
[6] Exh. "A-1," at 18:1-10; *see* Exh. "A-7."
[7] Exh. "B," at 1, ¶ 3; Exh. "A-8," at 8:11-24, 9:1.
[8] Exh. "B," at 1, ¶ 3.
[9] Exh. "A-8," at 8:6-10; Exh. "B," at 1-2, ¶ 4.
[10] Exh. "A-1," at 18:19-22; Exh. "A-8," at 9:2-7.
[11] Exh. "B," at 2, ¶ 6; Exh. "A-8," at 10:6-16; Exh. "A-1," at 19:9-11, 20:10-12.

Barry's customers.[12] During this time, RG Barry allowed Plaintiff to work remotely from her home in San Angelo.[13] Eventually, however, RG Barry expected UTi to become self-sufficient without the need for an RG Barry employee to assist with its distribution processes.[14]

As part of the reorganization, Mr. Evans hired Chris Dickson, Vice President of Logistics in October 2012 at the Ohio headquarters.[15] Mr. Dickson reported to Mr. Evans and Plaintiff reported directly to Mr. Dickson.[16] At the time Mr. Dickson was hired, Mr. Evans told him that Plaintiff's position was temporary and that he anticipated the need for her position to continue another six months.[17] Additionally, because Plaintiff's "Distribution Manager" title was no longer applicable (as there was no distribution center for her to manage), Mr. Dickson changed Plaintiff's title to "Operations Manager"—a newly created title.[18]

Mr. Evans continued to retain Plaintiff beyond the period he initially intended because Mr. Dickson believed that she was still providing value to the organization by helping UTi understand RG Barry's operations.[19] However, neither Mr. Evans nor Mr. Dickson intended for the temporary nature of Plaintiff's position to change—only the length of time they could continue using her skills.[20] Moreover, the transition became a lengthy process because RG Barry switched to a new operating system—Simparel, which also had to be implemented at UTi.[21] The new operating system handled many critical functions for RG Barry, including its financial data, inventory management, and sales data.[22] Project Manager, Seth DeVlugt, based in Columbus,

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[12] Exh. "A-3," at 73:7-12; Exh. "A-8," at 10:6-16; Exh. "A-1," at 20:16-20; Exh. "A-4," at 10:24, 11:1; Exh. "A-2," at 8:17-18.
[13] Exh. "A-1," at 21:13-15.
[14] Exh. "B," at 2, ¶ 9; Exh. "A-8," at 21:6.
[15] Exh. "B," at 2, ¶ 7; Exh. "A-8," at 16:10-13.
[16] Exh. "B," at 2, ¶ 7; Exh. "A-8," at 17:8-10.
[17] Exh. "A-2," at 9:11-19.
[18] Exh. "A-2," at 16:13-15, 17:3-5; Exh. "A-1," at 17:3-5.
[19] Exh. "A-8," at 12:20-23; Exh. "A-2," at 10:1-3.
[20] Exh. "A-2," at 9:22-24.
[21] Exh. "B," at 2, ¶ 8; Exh. "A-1," at 23:17-23; Exh. "A-2," at 17:19-24, 18:1-4.
[22] Exh. "A-1," at 23:17-23; Exh. "A-2," at 18:1-15.

Ohio, was assigned to the implementation team responsible for transitioning RG Barry's operation system to Simparel.[23]

C. The Need for Plaintiff's Transitional Role Diminished

Around the fall of 2013, Mr. Dickson determined that it was necessary to adjust Plaintiff's role in order to continue gaining value from her employment.[24] Specifically, the need for Plaintiff to manage UTi's distribution of RG Barry's products began to diminish as UTi became more familiar with its customers' requirements.[25] Thus, in an effort to continue to utilize Plaintiff, Mr. Dickson asked her to spend more time on compliance research.[26] Compliance research is required when a customer seeks to reduce its invoice for a particular reason, e.g., product shortage, ticketing error, late, etc.[27] RG Barry must then determine the cause, correction required, and process improvements it can make to minimize future chargebacks.[28] Because Mr. Dickson wanted Plaintiff to shift her focus to compliance, he began having Plaintiff report to Kathleen Woods, Compliance Manager.[29] Plaintiff admitted that despite Mr. Dickson's direction to focus on compliance, Plaintiff spent very little of her time doing so.[30]

D. RG Barry Closed the Portland, Oregon Warehouse and Terminated All Warehouse Employees

Like it did with the San Angelo DC, RG Barry closed its Portland warehouse in January 2014 and outsourced its function to UTi.[31] At the time, Mr. Evans oversaw the Portland warehouse and had input into the decision to close it down.[32] As a result of closing the Portland warehouse, Mr. Evans laid off all employees there, with the exception of a few employees who he retained to assist with the transition.[33] The longest-remaining employee at the warehouse was the Warehouse Manager, John Horton, who was retained for approximately 6 months to assist with the transition to UTi.[34] Similar to Plaintiff, Mr. Horton managed the warehouse before it closed.[35] Because Mr. Horton's position was only needed until the transition of operations to UTi was complete, Mr. Evans terminated Mr. Horton's employment on June 27, 2014.[36]

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[23] Exh. "A-1," at 44:19-21; Exh. "A-2," at 14:18-23.
[24] Exh. "A-2," at 13:4-24, 14:1.
[25] Exh. "A-8," at 20:18-21; Exh. "B," at 2, ¶ 9.
[26] Exh. "A-2," at 13:20-22, 18:18-21
[27] Exh. "A-2," at 18:24, 19:1-4.
[28] Exh. "A-4," at 13:10-19.
[29] Exh. "A-1," at 17:15-17; Exh. "A-8," at 18:17-24, 19:1-6. Ms. Woods is currently Operations Manager. Exh. "A-4," at 7:1-5.
[30] Exh. "A-1," at 99:17-18.
[31] Exh. "A-8," at 12:23-24, 13:1; Exh. "B," at 3, ¶ 13.
[32] Exh. "B," at 3, ¶ 13.

E. The Company Experiences Financial Straits and Conducts Another RIF

RG Barry failed to achieve the targets set forth in its sales plan for the 2014 holiday season.[37] Consequently, in December 2014, the company operated under "Code Red"—a phrase used to alert RG Barry's employees that the business is in a state requiring emphasis on reducing, eliminating, and delaying any discretionary expenses.[38] Plaintiff does not dispute that, at the time of her termination, RG Barry was operating under a "Code Red."[39] As such, the company reviewed the organization to identify ways in which it could reduce costs.

1. Mr. Evans Eliminates Plaintiff's Temporary Position

At the time the company was in "Code Red" status, shipping errors at UTi decreased and the conversion to Simparel was complete.[40] As a result, Mr. Evans determined that he could eliminate Plaintiff's temporary position and provide cost savings to the company since Plaintiff's responsibilities could be eliminated or disseminated to others.[41] In particular, Plaintiff's compliance responsibilities were being outsourced to Smyth, a third-party company; Plaintiff's management of UTi's operations could be eliminated as UTi was expected to handle those functions on its own; Chris Dickson could (and did) absorb duties relating to budgeting of UTi; and Seth DeVlugt, Logistics Project Manager, could (and did) absorb the remaining day-to-day operational duties that Plaintiff held.[42] Thus, on January 5, 2015, Mr. Evans eliminated Plaintiff's position.[43] Plaintiff's position was one of three that the company eliminated as part of its 2015 reduction-in-force in order to reduce expenses.[44]

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[33] Exh. "B," at 3, ¶ 14.
[34] Exh. "B," at 3, ¶ 14.
[35] Exh. "B," at 3, ¶ 14.
[36] Exh. "B," at 3, ¶ 14.
[37] Exh. "A-3," at 31:17-18, 32:19-21.
[38] Exh. "A-3," at 32:10-18; Exh. "A-8," at 26:8-14.
[39] Exh. "A-5."
[40] Exh. "A-2," at 17:19-24, 18:1-4.
[41] Exh. "B," at 2, ¶ 11. Exh. "A-8," at 20:22-24, 21:1-14, 26:2-24, 27:1-24, 28:1-2.

2. The "Operations Manager" Position is Redefined

Because Mr. DeVlugt continued to handle duties that he held as the Logistics Project Manager when he absorbed some of Plaintiff's operational duties and picked up additional duties, Mr. Dickson consolidated his position into a new "Operations Manager" position.[45] The new position was significantly different from the position that Plaintiff held. Specifically, in the Plaintiff's "Operations Manager" position, she focused largely on helping UTi with day-to-day shipping operations (e.g., reviewing daily orders to make sure UTi routed them correctly, helping UTi learn customer shipping requirements, and assisting with inventory controls when UTi and RG Barry used different operating systems).[46] Indeed, Plaintiff admitted that part of her role was to make sure UTi was doing what it was supposed to be doing.[47]

In contrast, Mr. DeVlugt's Operations Manager position, located in Columbus, Ohio,[48] required him to focus on supply chain financial and operational expectations, which included the following new responsibilities: (1) reporting on metrics, (2) establishing quality assurance initiatives, (3) facilitating improvements of core business processes and rules, (3) determining needs from all company departments and developing improvement plans, (4) managing project budget and resource allocation, and (5) leading the development and implementation of system reporting and data gathering for the supply chain management team.[49] The new position also required additional qualifications, including having: (a) a minimum of an undergraduate degree in related field of study, (b) experience with various projects with supply chain implications, (c) an outstanding grasp of information technology concepts and processes, (d) knowledge and experience with Simparel preferred, and (e) data analysis knowledge.[50]

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[42] Exh. "A-8," at 20:22-24, 21:1-14, 26:2-24, 27:1-24, 28:1-2; Exh. "B," at 2-3, ¶¶ 11, 12.
[43] Exh. "A-8," at 39:5-8; Exh. "B," at 2, ¶ 10.
[44] Exh. "B," at 2, ¶ 10; Exh. "C-1."
[45] Exh. "B," at 3, ¶ 15; Exh. "A-2," at 22:17-24.
[46] Exh. "A-1," at 76:14-25, 77:1-11, 20-25, 78:1-14, 80:14-24, 81:17-25, 82:1-19.
[47] Exh. "A-1" at 78:7-10.
[48] Exh. "A-3," at 17:4-6, 24:22-24.

3. Seth DeVlugt is Better Qualified for the "Operations Manager" Position

Mr. DeVlugt was well-qualified to handle the job responsibilities required of the new Operations Manager position. Specifically, Mr. DeVlugt held a B.S. from the Ohio State University, majoring in operations management, including lean business and process improvement.[51] In contrast, Plaintiff had no education beyond high school.[52] Additionally, Mr. DeVlugt had worked in a logistics management role since the fall of 2013 and his overall performance fully met and exceeded most expectations of his manager, Mr. Dickson.[53] In contrast, Plaintiff's overall performance review for the same period of time fully met expectations, but did not exceed the expectation of her manager, Ms. Woods.[54]

Mr. DeVlugt also had significant experience with software and other information technology, which included his prior employment as an information technology recruiter.[55] In contrast, Plaintiff admits that she does not have experience with information technology concepts

[49] Exh. "A-6."
[50] Exh. "A-6."
[51] Exh. "C-3," at 1; Exh. "C-4," at 1.
[52] Exh. "A-1," at 142:23-25, 143:1-8.
[53] Exh. "C-6," at 4, 7.
[54] Exh. "C-5," at 3, 7.
[55] Exh. "A-1," at 144:1-10; Exh. "C-4," at 1; Exh. "C-3."

and processes.[56] Moreover, Plaintiff testified that Mr. DeVlugt had more experience with and knowledge about Simparel than she did.[57] Plaintiff also acknowledged that Mr. DeVlugt was "very good" at creating "forms and charts" from data, which Mr. Dickson appreciated.[58] Finally, Plaintiff acknowledged that Mr. DeVlugt "was eager"[59] and came across to others as being "very knowledgeable."[60] Indeed, Plaintiff believed that Mr. DeVlugt "tr[ied] to become an expert on everything."[61]

F. Plaintiff Claims She Was Terminated So Mr. DeVlugt Could Take Her Position Because, Among Other Things, He Was "Very Educated," and "Handsome"

Plaintiff (DOB: 01/05/57) claims that she was terminated so Mr. DeVlugt (DOB: 09/24/88) could take her position.[62] Specifically, Plaintiff believes that Mr. Evans (DOB: 05/02/61) and Mr. Dickson (DOB: 06/04/68) favored Mr. DeVlugt because he was part of the "boys' club," which she admitted did not include all men, "he was young and handsome and very educated," and because the company could pay him less.[63] At the time Plaintiff was terminated she earned approximately $76,000, while Mr. DeVlugt earned approximately $66,000 after he was assigned to the new Operations Manager position.[64] Ultimately, Plaintiff claims that it was Mr. DeVlugt's promotion of himself that resulted in her termination. Plaintiff testified:

> A. . . . He was eager. I can't blame Seth [DeVlugt] for trying to promote himself, but I felt like it was at my expense. . . . I don't blame Seth [DeVlugt] as much as I blame Chris [Dickson].
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> Q. What do you blame Chris [Dickson] for?

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[56] Exh. "A-1," at 144:11-13.
[57] Exh. "A-1," at 44:10-16.
[58] Exh. "A-1," at 107:13-23.
[59] Exh. "A-1," at 112:11.
[60] Exh. "A-1," at 113:11-17.
[61] Exh. "A-1," at 106:16-18.
[62] Exh. "A-1," at 7:23-24.
[63] Exh. "A-1," at 8:18-25, 9:7-15.
[64] Exh. "A-5," at 1; Exh. "C-2"; Exh. "C-3."

> A. Thinking that because of his knowledge of Simparel that – he loved him. He was like his son. I don't know how to tell you. My first evaluation with Chris, at least half of the evaluation was talking about Seth. So he was very impressed.
>
> Q. When you say he was impressed by Seth's work, was it because he was so familiar with Simparel?
>
> A. I think that was one of them because he talked a big game, you know. He was – he talked a big game.
>
> ***
>
> Q. He came across as being a very knowledgeable person?
>
> A. Correct.
>
> Q. And Chris [Dickson] apparently liked that?
>
> A. Correct.
>
> Q. Any other reason you think Chris [Dickson] really liked Seth?
>
> A. No. Like I said, he treated him like his son.[65]

IV. ARGUMENT AND AUTHORITIES

A. Summary Judgment Standard

RG Barry seeks summary judgment on all of Plaintiff's claims. Determination of this motion is governed by the well-established standards of Rule 56 of the Federal Rules of Civil Procedure. Summary judgment is proper where competent summary judgment evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(a); *Kee v. City of Rowlett*, 247 F.3d 206, 210 (5th Cir. 2001). Under Rule 56, the moving party has the initial burden of establishing that there are no issues of material fact and that it is entitled to judgment as a matter of law. *Id.* This can be met by pointing to an absence of evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

[65] Exh. "A-1," at 112:11-25, 113:1-21.

Once this burden is satisfied, the nonmoving party must submit or identify evidence that designates specific facts showing a genuine issue of material fact exists as to each element of his cause of action. *Id.* at 323; *see* FED. R. CIV. P. 56(c)(1). Mere conclusory allegations, unsubstantiated assertions, and unsupported speculation are not competent summary judgment evidence and are insufficient to defeat a motion for summary judgment. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007). If the nonmoving party fails to make such a showing, then summary judgment must be granted. *Celotex*, 477 U.S. at 322-23.

B. The *McDonnell Douglas* Burden Shifting Framework Applies in ADEA and Title VII Claims

In both Title VII of the Civil Rights Act of 1964 ("Title VII") and the Age Discrimination in Employment Act of 1967 ("ADEA") cases, where there is no direct evidence of discriminatory intent, [66] the court will apply the well-known *McDonnell Douglas* burden shifting frame work. *Katseanes*, 511 Fed.Appx. 340, 344 (5th Cir. 2013). Under the *McDonnell Douglas* approach, a plaintiff must first establish, by a preponderance of evidence, a *prima facie* case of discrimination. *Id.* If this burden is satisfied, the defendant must give a non-discriminatory reason for its decision. *Id.* The burden will then shift back to the plaintiff to show that the defendant's proffered reason is false and but a pretext for its discriminatory intent. *Id.*

[66] Plaintiff alleges that Greg Tunney, CEO, stated that the company was top heavy with "seasoned" employees. Even assuming such a comment was made, it is not direct evidence of discriminatory intent. Exh. "A-1," at 53:1-25, 54:13-21. A comment is direct evidence of discrimination only if, among other things, it is: (1) related to the protected class of persons of which the plaintiff is a member, (2) proximate in time to the adverse employment action, and (3) related to the employment decision. *See Krystek v. University of Southern Mississippi*, 164 F.3d 251, 256 (5th Cir. 1999). First, Mr. Tunney's comments were not related to age, as he testified that by "seasoned" he was referring to employees with experience. Exh. "A-3," at 57:5-9. Second, Plaintiff admitted that these comments were made approximately three years before her termination. Exh. "A-1," at 53:1-25, 54:13-21. *See Berquist v. Wash. Mut. Bank*, 500 F.3d 244, 352 (5th Cir. 2007) (holding that comment made six months prior to termination was not probative of discriminatory intent). Third, Plaintiff does not allege (nor can she) that Mr. Tunney's alleged use of the word "seasoned" was directed at her or related to the decision to terminate her employment.

C. Plaintiff Cannot Establish a *Prima Facie* Case of Age or Sex Discrimination

Plaintiff claims that RG Barry discriminated against her on the basis of sex and age under Title VII and the ADEA, respectively.[67] In order to establish a *prima facie* case, Plaintiff must show: (1) she is a member of a protected class; (2) she was adversely affected by her employer's decision; and (3) she was qualified to assume another position at the time of her termination. *See Campbell v. Zayo Group, LLC*, No. 3:13-CV-2192-D, 2015 U.S Dist. LEXIS 82810 (N.D. Tx. June 25, 2015). In addition, where a plaintiff is not replaced, as in a RIF, she must satisfy a fourth element—that "others who were not members of the protected class remained in similar positions.'" *See id.*; *Vaughn v. Edel*, 918 F.2d 517, 521 (5th Cir. 1990). Plaintiff cannot satisfy the last two elements of a *prima facie* case.

1. Plaintiff's Claims Fail Because She Was Not Qualified for the New Operations Manager Position

"[A] plaintiff challenging [her] termination or demotion can ordinarily establish a *prima facie* case of age discrimination by showing that [she] continued to possess the necessary qualifications for [her] job at the time of the adverse action." *Bienkowski v. American Airlines*, 851 F.2d 1503, 1506 (5th Cir. 1988). Plaintiff does not and cannot dispute that RG Barry consolidated responsibilities and redefined the Operations Manager position. *See* Section III.E.2, *supra*. The new position included qualifications that Plaintiff did not possess, including a bachelor's degree and an in-depth knowledge of information technology concepts and processes. *See* Section III.E.3, *supra*. Plaintiff, therefore, was not qualified for the new Operations Manager position.

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[67] Because "[t]he standard of proof for Title VII discrimination claims also applies to . . . and ADEA claims[,]" they can be analyzed conjunctively. *Roberson v. Alltel Info. Servs.*, 373 F.3d 647, 651 (5th Cir. 2004) (citations omitted).

2. *Plaintiff's Claims Fail Because She Cannot Demonstrate that a Male Remained in a "Similar Position"*

Though Plaintiff alleges that Mr. DeVlugt ultimately replaced her, the "Operations Manager" position he held following her termination was not "similar" to the position Plaintiff held. For Mr. DeVlugt's position to be "similar," it must be "nearly identical" to the position Plaintiff held. *See, e.g.*, *Tucker v. SAS Inst., Inc.*, 462 F. Supp. 2d 715, 426 (N.D. Tex. Nov. 7, 2006) (holding that plaintiff failed to establish a *prima facie* case because, in part, the employees retained after the RIF had different job duties, and thus, "their circumstances were not 'nearly identical'"); *Gonzales v. I.T.T. Consumer Fin. Corp.*, 1995 U.S. App. LEXIS 42483, *1 (5th Cir. Oct. 27, 1995) (holding that a position with "much greater responsibilities" than the comparator position is not "similar").

The only similarity between Mr. DeVlugt's position and Plaintiff's former position is the title itself, but otherwise, the job responsibilities and qualifications were newly created. Specifically, the former "Operations Manager" position that Plaintiff held focused on helping UTi with its daily on-the-ground operations. *See* Section III.E.2, *supra*. The new position that Mr. DeVlugt held did not focus on day-to-day operations at UTi, but rather, focused on overall supply chain financial and operational expectations and included new responsibilities and qualifications. *See* Section III.E.2, *supra*. Moreover, the Operations Manager position that Mr. DeVlugt held was in Columbus, Ohio—not San Angelo, Texas. *See* Section III.E.b, *supra*; *See Meinecke v. H & R Block of Huston*, 66 F.3d 77 (5th Cir. 1995) (holding that where plaintiff's office was closed and her position eliminated and a younger male consultant at another location absorbed some of her job duties, she could not demonstrate that males remained in "similar" positions after she was discharged). Thus, because Mr. DeVlugt held an entirely different position than Plaintiff, she cannot set forth a *prima facie* case of discrimination.

D. RG Barry Can Demonstrate a Legitimate, Nondiscriminatory Reason for Plaintiff's Termination

Assuming *arguendo*, that Plaintiff could demonstrate a *prima facie* case, RG Barry has articulated a legitimate, nondiscriminatory reason for Plaintiff's termination—that is, her position was eliminated as a cost-savings measure. *See* Section III.E.1, *supra*. "An employer's decision to eliminate a job position . . . has been recognized as a legitimate, non-discriminatory reason for terminating an employee." *Chapman*, No. 3:06-cv-2211-B, 2008 U.S. Dist. LEXIS 42191, at *22. *See also E.E.O.C. v. Tex. Instruments, Inc.*, 100 F.3d 1173, 1181 (5th Cir. 1996) (a RIF "is itself a legitimate, nondiscriminatory reason for discharge"); *Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 150 (5th Cir. 1995) ("Job elimination or office consolidation is a sufficient non-discriminatory reason for discharge under the ADEA"); *Powell*, 776 F. Supp. 2d at 273 ("An economically-motivated RIF constitutes a legitimate, nondiscriminatory reason for an employee's termination."). "As a consequence, courts, which are ill-suited to make personnel decisions, are loathe to substitute their views for that of individuals with the requisite training and experience who are charged with those decisions." *Id.*

Here, at the time of Plaintiff's termination, RG Barry was operating under "Code Red," her responsibilities were eliminated and disseminated, and the elimination of her position and retention of Mr. DeVlugt provided cost savings to the company. *See* Section III.E, *supra*; *See, e.g.*, *Brown v. Miss. State Senate*, 548 Fed. Appx. 973 (5th Cir. 2013) (concluding that defendant was justified in terminating plaintiff in the company's RIF, in part, because uncontroverted evidence demonstrated that plaintiff's termination resulted in cost savings to the company since she was paid more than the retained employee); *Chapman*, No. 3:06-cv-2211-B, 2008 U.S. Dist. LEXIS 42191, at *6-9 (dismissing plaintiff's claim of discrimination where the defendant opted for a RIF and reduced, consolidated and eliminated positions when it experienced a decrease in revenue). As such, RG Barry has demonstrated a legitimate, non-discriminatory reason for the termination of Plaintiff's employment.

E. Plaintiff Cannot Establish Pretext

"To establish pretext, [Plaintiff] must introduce sufficient evidence for a reasonable jury to find that [RG Barry's] 'proffered explanation is false or unworthy of credence.'" *Campbell v. Zayo Group, LLC*, No. 3:13-CV-2192-D, 2015 U.S Dist. LEXIS 82810 (N.D. Tx. June 25, 2015) (quoting *Vaughn v. Woodforest Bank*, 665 F.3d 632, 637 (5th Cir. 2011)). To carry her burden, Plaintiff "'must produce substantial evidence of pretext.'" *Id.* (quoting *Auguster v. Vermilion Parish Sch. Bd.*, 249 F.3d 400, 402-03 (5th Cir. 2001)). "The plaintiff's burden of proof under the third stage of McDonnell Douglas is higher for . . . [ADEA] claims than for Title VII claims. For an ADEA claim, the plaintiff must demonstrate that age was a but-for cause of the adverse employment action. For a Title VII claim, in contrast, the plaintiff need demonstrate only that sex was a motivating factor." *Reynolds v. Sovran Acquisitions, L.P.*, 650 Fed. Appx. 178, 181 n.4 (5th Cir. 2016).

1. Plaintiff Cannot Demonstrate That She Would Not Have Been Terminated "But For" Her Age

Under the ADEA, a plaintiff must prove by a preponderance of the evidence that age was the "but-for" cause of the challenged employer decision. *Katseanes v. Time Warner Cable, Inc.*, 511 Fed.Appx. 340, 344 (5th Cir. 2013) (citing *Gross v. FBL Fin. Servs.*, 557 U.S. 176, 177-78 (2009). That is, age must be the reason that the employer decided to act. *Id.* Plaintiff cannot meet her burden for several reasons.

To begin, Plaintiff admits that she believes there are numerous legitimate, non-discriminatory reasons for her termination. In particular, Plaintiff alleges that she was terminated so Mr. DeVlugt could remain employed—not because of her age. *See* Section VI.F, *supra*. Plaintiff further admitted that she believed Mr. DeVlugt was retained for reasons unrelated to his age, including that he was "very educated," "handsome," could be paid less, and came across as being a very knowledgeable person. *See* Section III.F, *supra*. Consequently, by Plaintiff's own admission, she cannot demonstrate that "but for" her age, her employment would not have been terminated.

Additionally, to the extent Plaintiff claims that CEO Greg Tunney's alleged 2012 statements regarding "seasoned" employees establishes pretext, Plaintiff's claims fail. First, Mr. Tunney did not make the decision to terminate Plaintiff's employment. *See* Section III.E.a, *supra*. Second, Plaintiff claims that Mr. Tunney's statements were made nearly three years prior to her termination. *See* Section VI.B, n.66, *supra*. Such stray remarks, standing alone, are insufficient to create fact disputes. *Katseanes*, 511 Fed.Appx. at 346 (Plaintiff's supervisor's statement that she "wanted to 'get rid of the older' account executives" did not create a fact dispute of age discrimination since the "comments were made some time before [plaintiff] was fired" and did not refer to the plaintiff specifically). Third, Mr. Tunney testified that the word "seasoned" meant "experienced" and had nothing to do with age. *See* Section VI.B, n.66, *supra*.

Moreover, RG Barry retained 106 employees at the time of the January 5, 2015 RIF—60% of whom are females and 61% over the age of 40 (6% of whom were older than Plaintiff).[68] Of the female employees retained, more than 50% are over the age of 40.[69] *See Chapman v. Dallas Morning News, L.P.*, No. 3:06-cv-2211-B, 2008 U.S. Dist. LEXIS 42191, at *18-19 (N.D. Tx. May 27, 2008) (dismissing plaintiff's claim of discrimination in part, because of "the record evidence showing employees over 40 or female that were not adversely affected by the RIF.").

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[68] *See* Exh. "C-1," at 1.
[69] *See* Exh. "C-1," at 1.

For the foregoing reasons, Plaintiff cannot set forth any evidence that age was the "but for" cause of her termination.

2. Plaintiff cannot demonstrate that sex was a motivating factor

Plaintiff, likewise, cannot demonstrate any evidence that sex was a motivating factor in the reason for her termination.

First, Plaintiff claims that she was terminated in order to retain Mr. DeVlugt, who she believes was retained because he was "very educated," was very knowledgeable about Simparel, was "handsome," and could be paid less. *See* Section III.F, *supra*. Plaintiff also claimed that Mr. DeVlugt was part of the "boys club," but admitted that a person was not part of the "club" because of sex since other men were excluded. *See* Section III.F, *supra*. As such, Plaintiff can set forth no evidence that sex was a motivating factor in the reason for her termination.

Second, the record evidence demonstrates that 60% of the employees retained following the 2015 RIF were female. *See* Section III.E.1, *supra*.

Third, like with Plaintiff, Mr. Evans terminated Mr. Horton, the Portland warehouse manager, after RG Barry closed the warehouse and transitioned its function to UTi. *See* Section III.D, *supra*. Though Mr. Evans retained both to assist with the transition of their respective locations to UTi, he retained Plaintiff for a much longer period of time. *See* Section III.D, E, *supra*. In effect, Plaintiff was treated more favorably than her male counterpart in Portland. *See* Section III, D, E, *supra*. Consequently, Mr. Evans' actions demonstrate his lack of discriminatory animus towards women.

Fourth, to the extent Plaintiff claims that she should have been retained following the RIF rather than Mr. DeVlugt, she must "produce evidence creating a fact issue as to whether she was 'clearly better qualified' than [Mr. DeVlugt]. To do so, she must produce evidence suggesting that the disparities in qualifications between herself and [Mr. DeVlugt] were of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen Mr. DeVlugt over Plaintiff." *Chapman*, No. 3:06-cv-2211-B, 2008 U.S. Dist. LEXIS 42191, at *23. When considering whether a plaintiff was "clearly better qualified," [t]he issue . . . is not whether [the plaintiff] or the retained employees were better qualified. The [employer] is entitled to make that decision for itself. . . . the factfinder [must] determine[] that [the plaintiff] was clearly better qualified than the employees who were retained." *Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 814 (5th Cir. 1991) (emphasis in original). Here, Plaintiff admits that there are several qualifications for the new Operations Manager position that Mr. DeVlugt held but that she did not. *See* Section III.E.3, *supra*. Consequently, Plaintiff cannot demonstrate that she was "clearly better qualified."

3. Plaintiff cannot establish pretext in light of the "same actor" inference

Mr. Evans—who is only four years younger than Plaintiff—made the decisions to promote Plaintiff to Distribution Center Manager in 2007 when she was 50 years old, retain Plaintiff after terminating every other employee at the San Angelo distribution center in 2012 when she was 55 years old, and to terminate Plaintiff's employment in January 2015. *See* Sections III.A, B, and D, *supra*. This situation gives rise to the "same actor" inference—an inference that discrimination was not the motive behind Plaintiff's termination. *See Brown v. CS Logic, Inc.*, 82 F.3d 651, 658 (5th Cir. 1996). Mr. Evans' favorable actions demonstrate that he was not motivated by age or sex when he eliminated Plaintiff's position as "it hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job.'" *Brown*, 82 F.3d at 658 (quotations omitted) (holding that where the employee was hired at the age of 54 and fired just four years later by the same decision maker, the "same actor" inference applies that "discrimination was not the motive behind the [employee's] termination."); *See White v. Omega*

Protein Corp., 226 Fed. Appx. 360; 2007 U.S. App. LEXIS 6287, *8 (5^{th} Cir. 2005) (holding that plaintiff could not establish pretext in light of the "same actor inference" where plaintiff was hired at age 50 and terminated five years later by the same person). In addition, the fact that Mr. Evans was within the protected age class at the time he made the decision to terminate Plaintiff enhances this inference. *See Brown*, 82 F.3d at 658 ("The fact that the actor involved in both employment decisions is also a member of the protected class only enhances the inference.").

For the foregoing reasons, Plaintiff cannot demonstrate that sex was a motivating factor in the decision to terminate her employment or that age was the but-for cause of her termination. As such, Plaintiff cannot establish pretext.

V. CONCLUSION

RG Barry respectfully requests that this Court grant its motion for summary judgment and dismiss Plaintiff's claim against RG Barry with prejudice, and grant RG Barry such other and further relief as it is entitled to receive.

Respectfully submitted,

/s/ Angela J. Gibson

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of November, 2016, I electronically filed the above and foregoing *R.G. Barry Corporation's Motion for Summary Judgment* with the Clerk of Court using the CM/ECF system which will send notification of such filing to:

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